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Supreme Court Of The United States

No. 73-473

DANIEL T. TAYLOR, III - - - - Petitioner

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION - - - - - - - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Louisville Bar Association, as Amicus Curiae, respectfully submits this brief in support of the Petition for Writ of Certiorari and urges the Court to grant the petition.

INTEREST OF THE AMICUS CURIAE

The Louisville Bar Association was established in 1900, originally comprising a small group of attorneys in the local community. Over the years, the Association

has gradually grown to a membership numbering over 1,000 attorneys and judges from the entire metropolitan area. The purposes of the Association, as enumerated in its constitution, are to promote and maintain high standards for the legal profession; to promote legal education; to cultivate association and acquaintance among the members of the Bar; to increase their usefulness in the administration of justice; and to promote legal and judicial reforms.

In furtherance of these goals and in the interest of its membership, the Association submits this brief. This case is one in which a lawyer has been summarily convicted of contempt, sentenced to jail, and denied redress upon appeal.

The issues here do not, however, concern Daniel Taylor alone. They concern all practicing attorneys, not only in Louisville, but in every courtroom across the country. The issues in this case call into question the integrity and respect of our judiciary, the demeanor of our attorneys towards that judiciary, and the public's opinion and response to both the judiciary and the legal profession. These issues will necessarily be narrowed by the petitioner, but the decision will have a broad impact upon all lawyers.

Thus, the membership of the Louisville Bar Association has a vested interest in the outcome of this case as it relates to the balance between the summary contempt power of a judge and the constitutional rights of an attorney zealously representing his client.

REASONS FOR GRANTING THE WRIT

I

THE PETITION FOR CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE COURT SHOULD DETERMINE WHETHER THE PETITIONER WAS DENIED VARIOUS CONSTITUTIONAL RIGHTS WHEN THE KENTUCKY COURT OF APPEALS DECIDED CONSTITUTIONAL QUESTIONS RAISED BY THE PETITIONER ON APPEAL IN A MANNER WHICH VIOLATED THE LETTER AND SPIRIT OF APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The Amicus presents the following points detailing the manner in which the Petitioner was denied certain Constitutional rights because any member of the Association could be dealt with in a similar manner. The summary contempt power and the method which was employed hereunder by the trial judge in its exercise, present a serious threat to the Constitutional rights of all practicing attorneys and their clients. This is the most compelling issue for the Court to consider when evaluating the Petition for Certiorari.

(A)

The Petitioner was Denied his Sixth Amendment Right to a Trial by Jury when the Court of Appeals Ruled That, in Spite of the Sentence Imposed, the Right to a Trial By Jury Did Not Arise.

The trial judge originally sentenced the petitioner to a total of 54 months imprisonment, such sentence to be served consecutively. More than four months later, the trial judge was allowed to correct his judgment by reduc-

ing the sentence for two specifications from one year each to six months each. This reduced the total sentence to 41 months and as the judge erroneously assumed, also foreclosed the Petitioner's right to a trial by jury.

Unfortunately, the trial judge neglected to specify in the corrected judgment whether the sentences of imprisonment were to be imposed concurrently or consecutively. However, the Court of Appeals of Kentucky held that because the sentences were not so specified, they were to be served concurrently and for this reason Taylor did not have a right to trial by jury. In so holding, the Court of Appeals completely overlooked the holdings in two of their recent decisions. In *Beasley* v. *Wingo*, Ky., 432 S.W.2d 413 (1968) the Court ruled that sentencing was in the discretion of the trial judge, not the Appellate Court. In *McBride* v. *Commonwealth*, Ky., 432 S.W.2d 410 (1968) the same Court held that sentences which do not specify between concurrently or consecutively are to be served *consecutively*. The Court of Appeals of Kentucky neglected to either cite, overrule, or even comment on these two recent decisions precisely on point. One can only conclude that the Court of Appeals of Kentucky mistakenly overlooked these decisions and were in error in the Taylor decision. The Constitutional guarantee to a trial by jury is one of the most cherished rights a person has. Throughout our history this right has been jealously guarded by our Courts. We respectfully contend that the Supreme Court of the United States should not countenance an after the fact alteration of a jail sentence by the trial judge, an oversight, mistake, or error by the Court of Appeals of Kentucky to deny an attorney his

Constitutional right of trial by jury. While it is recognized that the Court has not specifically required aggregation of multiple contempt sentences, under either the original sentence or the corrected sentence, the Petitioner would have a Constitutional right to a trial by jury according to the import of the decisions of this Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); and *Baldwin* v. *New York*, 399 U.S. 66 (1970); and the decision of the Seventh Circuit in *United States* v. *Seale*, 461 F.2d 345 (CA 7, 1972).

(B)

The Trial Judge Violated the Petitioners' Constitutional Guarantee of Due Process of Law Under the 5th and 14th Amendements and His 6th Amendment Right to the Assistance of Counsel, When he Denied the Petitioner a Hearing on the Charges, a Specification of the Charges and an Opportunity to Speak in Defense or Mitigation of Those Charges.

At the conclusion of trial, the judge proceeded to sentence Mr. Taylor on the contempt citations brought during the trial. The Petitioner was prevented from speaking in his defense to the extent that the judge threatened to forcibly silence him. Since the trial judge delayed the disposition of the citations, and because at the time of sentencing he was not acting to quell a courtroom disturbance, to preserve the dignity of the court, or to protect the safety of courtroom personnel, the denial of a hearing, the assistance of counsel, the opportunity to speak in defense or mitigation, and the failure to advise the Petitioner of the charges, was violative of

procedural due process. *Weiss* v. *Burr;* CA 9 5/21/73. 13 Cr L2286. The judgment of the Court of Appeals of Kentucky is in direct conflict with the decision of the 9th Circuit.

One of the most fundamental principles of Anglo-American law is that "no one shall be punished without having had an opportunity to be heard in his defense". *Groppi* v. *Leslie* 404 U.S. 496, 501 (1972); In re *Oliver* 333 U.S. 257,273 (1948); In re *Hammersmith* 4 EX. 87, 96, 154 Eng Rep 1136, 1140 (1849). The summary contempt power is justified as necessary for a judge to protect the due and orderly administration of justice and to maintain the authority and dignity of the court. *Cooke* v. *United States,* 267 U.S. 517 (1925); In his dissent in *Sacher* v. *United States,* 343 U.S. 1, 30 (1952), Justice Frankfurter held that the contempt power had implied restrictions:

> " . . . Among the restrictions to be implied, as a matter of course, are two basic principles of our law—that no judge should sit in a case in which he is personally involved and that no criminal punishment should be meted out except upon notice and due hearing, unless overriding necessity precludes such indispensable safeguards for assuring fairness and affording the feeling that fairness has been done."

Once the trial was ended there no longer exists an overriding necessity which could justify the use of the summary contempt power. *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *United States* v. *Meyer,* 462 F.2d 827 (DC CA 1972). Just as in the case of an indirect contempt, no reason exists of great enough importance to deny the contemnor procedural due process of law. As the Court held in *Cooke* v. *United States* 267 U.S. 517, 537 (1925):

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel."

Therefore, since the judge waited until after the trial to pass sentence, he should have conducted a hearing on the charges with all attendant Due Process and Sixth Amendment guarantees before he passed sentence upon the Petitioner.

(C)

The Petitioner was Denied His Constitutional Right to a Fair Trial Before an Impartial Judge When the Court Of Appeals Affirmed the Judgment of the Trial Court, Where Clear and Compelling Evidence of the Trial Judge's Prejudice Towards the Petitioner was Apparent From the Record.

It has been well established by this court that a fair trial before an impartial magistrate is essential to Due Process. *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971). It was the considered opinion of the Court of Appeals of Kentucky, in the decision below, that the conduct of the trial judge was not prejudicial nor was there evidence of bias which would disqualify him from exercise of the summary contempt power. The Court of Appeals applied the decisions of the Supreme Court in *Offutt* v. *United States,* 348 U.S. 11 (1954), *Mayberry* v. *Pennsylvania,* Supra, and *Ungar* v. *Sarafite,* 376 U.S. 575 (1964) and did not find that "the trial court was an 'ac-

tivist seeking combat' with Taylor nor "did Daniel Taylor ever indulge in any personal attack of any kind upon the judge". *Taylor* v. *Hayes*, Ky., 494 S.W.2d 737, 744 (1973). They concluded that as long as the judge avoided becoming personally embroiled in controversy with the contemnor and the contemnor had not personally attacked the judge, they were not constrained to find bias or prejudice in the trial judge's conduct.

The standards of fairness that the Supreme Court applied to the contempt situation in *In re Murchison* 349 U.S. 133, 136 (1955), are rigorous.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome . . . Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law . . . But to perform its high function in the best way 'Justice must satisfy the appearance of Justice' ".

It is very difficult for a judge who has presided over a trial to be objective in dealing with a contemnor. It would be more realistic to assume that no trial judge before whom allegedly contemptuous acts are committed can properly and fairly conduct a summary contempt proceeding in an impartial and disinterested manner that would conform to the demands of due

process. Justice Jackson in his opinion in *Sacher* v. *United States,* 343 U.S. 1, 12 (1952) outlines the problem:

> " . . . It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other."

That the trial judge made disparaging remarks about Daniel Taylor and dealt with him in an unusual manner cannot be doubted. These remarks and actions are well chronicled in the Petition for Certiorari at pp. 20-28. The Amicus believes that these events clearly establish the fact that the trial judge adopted an adversary posture in regards to Mr. Taylor and should therefore have been disqualified from passing sentence at the conclusion of the trial. The standard that the Court of Appeals of Kentucky applied to the conduct of the judge was not Constitutionally stringent enough to determine whether Due Process had been violated because the Appeals Court failed to consider whether the judge had adopted an adversary posture towards the contemnor. *In re Murchison* 349 U.S. 133 (1955); *United States* v. *Meyer,* 462 F.2d 827 (CA DC 1972). Policy justifications for the use of summary power are overcome by the adversary posture of the judge and the conclusion of trial. Therefore the trial judge was disqualified from passing sentence upon Mr. Taylor.

" . . . It is enough to have concluded that the circumstances of this case do not give the appearance of judicial impartiality which in order to protect both alleged contemnors and the integrity of the judiciary, must be equated with the substance of impartiality. "Justice," as Justice Frankfurter wrote in an oft-quoted passage in Offutt, "Must satisfy the appearance of justice."

United States v. *Meyer,* Supra., p. 845

(D)

The Petitioner was Denied His Constitutional Right to Due Process of Law Under the 14th Amendment When the Court of Appeals Affirmed the Conviction Upon Specifications of Actions Which Were not Sufficient at Law to Constitute the Crime of Contempt and When the Court of Appeals Failed to Make a Reasonable Inquiry Into the Record to Establish the Elements of Contempt.

The elements of the crime of contempt are very vague and subjective because, historically judges have been given great latitude in exercising the summary contempt power. Summary punishment has always been regarded with disfavor and within recent years there has been a tendency on the part of the Court to limit its exercise, *Groppi* v. *Leslie,* 404 U.S. 496 (1972); *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *Bloom* v. *Illinois,* 391 U.S. 194 (1968). However, this Court has dealt with the issue of what constitutes a contempt in very general terms. It was held in *In re McConnell,* 370 U.S. 230, 234 (1962) that the conduct must amount to an "actual obstruction of justice", in *In re Michael,* 326

U.S. 224, 227 (1945) that the contempt must effect an "immediate interruption" of the court's business, and in *Ex Parte Hudgings*, 249 U.S. 378, 383 (1918) that the obstruction must be clearly shown. "It has frequently been held, and considerable scholarly comment support the view, that mere disrespect or affront to the judge's sense of dignity will not sustain a citation for contempt" *United States* v. *Seale*, 461 F2d 345, 369 (CA 7 1972); *Offutt* v. *United States*, 348 U.S. 11 (1954); *Brown* v. *United States*, 356 U.S. 148 (1958).

There is a point where disrespect becomes a material obstruction and thereby contempt. The case of *In re Little*, 404 U.S. 553, 555 (1972), while not being specific, gives a clearer indication of the line between mere disrespect and actual obstruction:

> " . . . The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute and imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

A showing of imminent threat to the fair administration of justice is therefore necessary to support a contempt conviction on appeal.

The Court of Appeals of Kentucky has not made such a showing in their opinion based on their examination of the trial record. Their entire opinion does not establish a specific instance of actual obstruction. Without ever considering the right of the Petitioner to zealously defend his client or the possibility that Judge Hayes misunderstood the Petitioner's actions, they

declare his conclusive guilt on all charges. Although numbers 3, 7 and 9 of the contempt specifications allege disrespect of the Court or persons therein, there is a total absence of any showing of an actual obstruction of the trial process. Justice Black's criticism of appellate review of contempt convictions in *Green* v. *United States*, 356 U.S. 165, 200 (1958) seems particularly appropriate here:

> ". . . a defendant's principle assurance that he will be fairly tried and punished is the largely impotent review of a cold record by an appellate court, another body of judges. Once in a great while a particular appellate tribunal basically hostile to summary proceedings will closely police contempt trials but such supervision is only isolated and fleeting. All too often the reviewing courts stand aside readily with the formal declaration that 'the trial judge has not abused his discretion.' "

Since the Court of Appeals of Kentucky failed to establish the elements of the crimes under the constitutional standards imposed by this Court the convictions cannot stand and are in violation of the Petitioner's Constitutional right to Due Process of Law.

II

THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS SERIOUS CONSTITUTIONAL QUESTIONS OF CRITICAL IMPORTANCE TO THE FAIR ADMINISTRATION OF CRIMINAL JUSTICE.

The summary contempt power of a judge to punish an offender without any of the Fifth, Sixth and Fourteenth Amendment guarantees of procedural Due

Process, stands as an anomaly in the law. It has been justified over the years because of the view that it was necessary to the orderly conduct of a trial that a judge have summary power to punish those who obstruct the proceedings or attack the integrity of the Court. The possibilities for abuse of the power are manifold because the power entrusted to a judge is "wholly unrelated to his personal sensibilities be they tender or rugged". Judges may "quite unwittingly identify offense to self with obstruction to law". *Offutt* v. *United States,* 348 U.S. 11, 13 (1954). The power is not only easily abused, the elements of the offense are ill-defined. As Justice Black said in his dissent in *Green* v. *United States,* 356 U.S. 165, 200 (1958):

> "It would be no overstatement therefore to say that the offense with the most ill-defined and elastic contours in our law is now punished by the harshest procedures known to that law."

The power is inconsistent with the principles of our Constitution, Bill of Rights and system of criminal justice which are based on the proposition that no one person should be vested with such excessive powers because they lend themselves so easily to abuse. As Edward Livingston said in his attack on the contempt power; *1 Edward Livingston Works* 260 (1873):

> "An offense so ill defined, so liable to be imputed, embracing such a variety of dissimilar acts, would be dangerous and oppressive in the extreme, were it to be prosecuted according to the ordinary forms of law; but all these are disregarded."

Thus the existence and use of the contempt power has a chilling effect on the freedom of attorneys and their clients in the exercise of their Sixth Amendment rights. This chilling effect applies especially in the case where the attorney is called upon to represent the defendant in a political trial or where his client has become notorious because of the nature of his crime or his controversial opinions. A broad summary power and the lack of meaningful Due Process guarantees, present a constant threat to the litigants' right to effective representation and the attorneys' willingness to be zealous in his defense. The problem was well stated by Justice Black in his dissent in *Sacher* v. *United States*, 343 U.S. 1, 18 (1952):

> "I cannot reconcile this summary blasting of legal careers with a fair system of justice. Such a procedure constitutes an overhanging menace to the security of every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular or defenders of unpopular persons or unorthodox causes."

The power has been perpetuated because it has generally been viewed as indispensable. In the words of Chief Justice Taft " . . . The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the Court is most important and indispensable." *Cooke* v. *United States*, 267, U.S. 517, 539 (1925).

However, if that power could be limited or an alternative substituted which would just as adequately serve the purpose for which it was designed, then the sum-

mary contempt power must be altered or abolished. The exercise of the contempt power must be "the least possible power adequate to the end proposed". *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Aderson* v. *Dunn*, 6 Wheat 204, 231 (1821); *In re Michael*, 326 U.S. 224, 227 (1945).

The Amicus believes that the ends proposed can be as adequately served by alternative methods while preserving the Constitutional rights of the accused. In the case of both litigants and attorneys the judge should deliver a citation for contempt which would have the same effect as an indictment. The threat of subsequent criminal action, and in the case of an attorney, the additional threat of professional disciplinary hearings, should be sufficient to control contumacious behavior in most cases. In the case of litigants the recent decision in *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970) allows the court wide latitude for dealing physically with a disruptive defendant in a criminal trial:

> "We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly".

In the case of an attorney, if the threat of subsequent criminal action and professional discipline are not enough to restrain him, in those instances where the disruption is so great that it threatens the validity of the trial, it would be better to declare a mistrial and then cite the attorney for Contempt. This would protect the defendant and prevent a complete retrial of a long case

after a reversal by an Appellate Court. Otherwise, the court must bear the burden of a continuous contest between the attorney and the authority of the court resulting in a detriment to all parties involved and the possibility of prejudicing the jury.

In keeping with our belief that lesser measures would suffice we maintain that definitive standards should be imposed upon the summary contempt power to prevent abuse and protect the Constitutional rights of an alleged contemnor. Therefore, the Amicus respectfully submits the following standards for the consideration by this Court:

1. The trial judge's power to deal with contempt should be limited to the issuing of a citation for contempt and specifying the allegations upon which the contempt is based.

2. A judge other than the one issuing the contempt citation should preside at the hearing.

3. The contempt citation must be judged according to the standard that the contempt must amount to an actual, material and reasonably significant obstruction of the trial process or must amount to a serious attack upon the integrity of the Court.

4. The person cited shall be given ample time to employ counsel and prepare his defense.

5. If the summary power of a trial judge to find a Contemnor guilty during the trial is re-affirmed by this Court, then he should be barred from fixing punishment. The punishment, if any, must then be fixed by another judge in a separate hearing at the conclusion of the trial and after ample time for defense preparation.

6. The right of the accused to speak in his defense or mitigation of the crime is fundamental to Due Process of law and must be given even in summary proceedings for contempt.

7. The sentence which is imposed at the trial level determines the defendant's 6th Amendment right to trial by jury and cannot thereafter be modified to deny that right.

8. The Court should define the test laid down in *Bloom* v. *Illinois*, 391 U.S. 194 (1968), that one looks to the "penalty actually imposed" to mean specifically that the penalty actually imposed is the total of the penalties for each specification of contempt whether they are to be served consecutively or concurrently for the purpose of deciding the Defendant's right of trial by jury.

Detailed discussion of the above suggested standards is beyond the scope of this brief in support of the Petition for Certiorari. However in the event that Certiorari is granted, the Amicus is prepared to present substantial reasons why these standards should be adopted in a brief on the merits.

CONCLUSION

The Petition for Certiorari should be granted because Daniel Taylor was denied various Constitutional rights by the actions of the trial judge and the affirmance of those actions on appeal to the Court of Appeals of Kentucky.

This Petition should also be granted because this case presents a valuable opportunity for the Court to

reconsider the balance between the summary power of contempt and the Constitutional rights of alleged contemnors. The Amicus believes that the summary contempt power should be restrained further because it is in excess of the power actually needed to fulfill the end proposed. The Court should take up the Petition as an opportunity to set down definitive standards which would give the trial judge all the power necessary to control of the courtroom, while at the same time, conforming to the procedures which have been adopted to guarantee the accused Due Process of Law.

Wherefore, the Amicus respectfully urges the Court to grant the Petition for Certiorari in this case.

Respectfully submitted,

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